



Neutral Citation Number: [2021] EWHC 2154 (QB)

Case No: QB 2020-002276

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2021

Before :

MASTER SULLIVAN

Between :

(1) **ABDULQAYYUM SHAH AJAB SHAH**
(2) **MEHTAB BEGUM**
(In their own name and on behalf of the estate of **AHMED**
ABDUL QAYUM SHAH, Deceased)

Claimants

- and -

(1) **L3 COMMERCIAL TRAINING SOLUTIONS LTD**
(2) **ESCOLA DE AVIAÇÃO AEROCONDOR SA**
(Trading as **G Air Training Centre**)
(3) **DIOGO PARALVA**

Defendants

Sarah Crowther QC (instructed by **Stewarts Law LLP**) for the **Claimants**
James Duffy (instructed by **DLA Piper UK LLP**) for the **First Defendant**

Hearing dates: 7 July 2021

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER SULLIVAN

Master Sullivan :

1. This claim arises out of the death of Ahmed Abdul Qayum Shah on 10 July 2018. Mr Shah was training to be a pilot and was undertaking a solo night flying exercise at an airfield in Ponte de Sor, Portugal. His plane crashed and he sadly died in the accident. The representatives of his estate bring a claim for damages arising out of his death.
2. The second defendant (EAA) is the flying school in Portugal operating out of Ponte de Sor and the third defendant was the flying instructor on the night of the accident. EAA is an approved flight training organisation. The exact relationship of the first defendant to EAA is in dispute, but it is an English registered company and part of the L3 Group of companies. EAA is also part of the L3 Group having been bought by the group in 2017. There is a dispute as to what, if any, control and supervision the first defendant had over the flight safety aspects of EAA. Whilst in the hearing the first defendant was referred to as L3 CTS, I will not do so as there was a dispute about whether all references to L3 CTS in the documents were to the first defendant company or were to a brand name or group name.
3. The claim was issued on 1 July 2020 against all three defendants. The claim was able to be issued in England because the first defendant is registered here and is therefore an “anchor defendant”. The claim form has not yet been served against the other defendants who have to be served out of the jurisdiction. It is agreed between the parties that Portuguese law applies to the question of liability.
4. The first defendant has made an application for summary judgment on the basis that it is not a proper party to the claim. It is said the first defendant neither had the ability to control and supervise EAA’s flight training processes nor sought to do so. In addition, and they seek to rely on evidence of Portuguese law that there is no arguable legal duty in Portuguese law.
5. The claimants resist the application and have applied to amend the particulars of claim to clarify the basis of the claim against the first defendant.

Summary Judgment

6. There is no dispute between the parties as to the principles that I must apply to the question of summary judgment. The claim must have a realistic as opposed to fanciful prospect of success. The principles are set out in *Easyair Limited v Opal Telecom* [2009] EWHC 339.
7. I bear in mind all the principles but of particular relevance in this claim are:
 - i) The court must not conduct a mini trial.
 - ii) That does not mean that the court must take at face value and without analysis everything that a claimant says in their statements before the court. In some

cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents.

- iii) The court must also take into account evidence that can reasonably be expected to be available at trial if not available now. That evidence must be reasonably expected. Cases should not be allowed to go to trial merely because it is said “something may turn up” which would have a bearing on the question of liability.

The basis of the claim

8. Until shortly before the hearing, this was a claim where the claimants alleged, and the first defendant agreed, that the first defendant was an indirect parent company of EAA. The first defendant served witness evidence confirming the group company structure showing that the first defendant was a parent company. Shortly before the hearing, the first defendant served further evidence indicating that was in fact incorrect. Although the first defendant and EAA share a parent company, they are on different branches of the group company tree.
9. The claimants maintain that the first defendant has the relevant control and supervision of EAA sufficient to found a claim.
10. The amended particulars of claim were put forward (before the more recent dispute about the ownership of EAA) in order to clarify the claimants’ claim. The first defendant objects to them on the basis that they do not in fact found a claim with real prospects of success. Given the stage of proceedings I am of the view I should approach the analysis of the claim from the amended particulars of claim. They have been made at an early stage of proceedings and there is no prejudice to the defendant.
11. The amended particulars of claim are said by the claimants to have been pleaded following advice by a Portuguese legal expert.
12. The pleaded duty of care is under articles 483,493 and 500 of the Portuguese civil code. It is pleaded that L3 CTS Airline and Academy Training Limited is a company under the control of the first defendant and which held itself out as controlling provision of commercial air training at multiple sites including EAA and that it was held out that the management of the training programme was managed centrally by the first defendant and that control of the relevant flight training manuals was by senior management and directors at the first defendant. That is, in summary, the basis on which it is said the first defendant has sufficient control and supervision of EAA to found a claim.

The application and factual evidence

13. The initial witness statement in support of the application was put on the basis that there was no arguable claim in Portuguese law and no basis for the claim on a scrutiny of the facts.
14. In addition to evidence from a Portuguese lawyer, Mr de Almeida, two statements were served from witnesses of fact, Mr Spínola, who says he is the Academy Airline Director for EAA and Ms Amdal, who is Safety and Compliance Director for the first defendant. They state that the first defendant was not involved in the administration of training in

respect of Mr Shah and that the first defendant had no governance over, supervision or oversight of EAA's flight training, operational and safety management systems. Mr Spínola says that such decisions are made at EAA board level. The two witnesses also confirmed that the first defendant was a parent company of EAA.

15. The claimants have served a witness statement in response which annexes documents said to be inconsistent with the factual assertions made by the first defendant's witnesses. They include an article in an aviation magazine which is titled "L3 CTS increases air cadet capacity at the L3 EAA" in which Mr Spínola is quoted. The article states:

"L3 Commercial Training Solutions (L3 CTS) announce development plans at the L3 EAA to increase the number of cadets training..."

"The L3 EAA ...was established earlier this year to build L3 CTS's worldwide pilot training".

"In addition to the investment in infrastructure and aircraft, the L3 EAA has been integrated in the company's wider cadet training offering."

16. It is said this contradicts Mr Spínola's evidence that following the acquisition, L3 CTS was not engaged in or involved in reviewing or amending EAA's training syllabus or its provision of training to students.
17. Other references are made to statements on L3 Harris website (which is part of the L3 group of companies) and to similar statements about L3 CTS's international footprint being expanded by the L3 EAA made by Mr Robin-Oliver Faure who is a director of the first defendant and described in the witness statement as President of the first defendant. He and Mr Spínola are photographed outside the Ponte de Sor facility which has a large sign reading, "L3 Commercial Training Solutions" on the building.
18. In reply the first defendant served evidence, alluded to above, in which it was stated for the first time that the first defendant was not a parent company of EAA. A witness statement was served from Charlotte Buckingham, a Principal Legal Compliance and Commercial lead for the Airline Academy business of the first defendant. She, unlike the previous witnesses, identifies the first defendant by the abbreviation "L3 CTS Ltd" rather than simply "L3 CTS". She gives a different group structure showing the first defendant is not the parent of EAA and provides annual reports and financial statements for EAA and the first defendant which show EAA to be wholly owned by DMRC Ltd which is a holding of L3 Global Holdings UK Ltd. EAA is not in the list of the first defendant's subsidiaries. No explanation is given of how the error about the corporate structure came about or how the incorrect organisation structure diagram came to be produced.
19. A second witness statement of Mr Spínola states he was wrong about the first defendant being a parent company. He does not explain how he came to sign the statement with the error. He goes on to explain that in February 2018 efforts were made to rebrand EAA as L3 Commercial Training Solutions, L3 CTS or L3 flight school. He says that was simply re-branding and nothing changed in terms of the flight training syllabus,

operation or provision of training. He says that L3 CTS Limited did not have control over EAA's finances or operation decisions.

Portuguese Law

20. Questions of foreign law are questions of fact to be determined by expert evidence where there is a dispute. The amended particulars of claim assert that there is liability in Portuguese law in the ways pleaded.
21. The first defendant served two witness statement from a Portuguese lawyer, Mr de Almeida. Both of these are in the form of witness statements of fact. There is a dispute between the parties as to whether permission is required in order to rely on expert evidence for summary judgment applications.
22. Irrespective of whether permission should be sought for expert evidence at summary judgment stage (for what it is worth, in my judgment it is; CPR Part 35 applies to all expert evidence, it is not restricted to certain stages of litigation) the evidence relied upon by the defendant as presented is in my judgment of very limited weight.
23. The statements are presented as witness statements of fact. They do not contain any of the matters which are required by part 35 and which ensure that the witness is giving independent expert evidence rather than expert evidence to support one party's case. There is no indication whether what the witness says is within a range of opinion or is the only possible view as to the law. There is no statement that he understands that his overriding duty is to the court. There is no statement as to the basis of his instructions. Without that it does not have the weight of independent expert evidence.
24. With no indication on the issue of whether this is the only interpretation of Portuguese law and given the claimants' solicitor has stated in a witness statement that they have supportive expert evidence, in my judgment all it does is indicate that there is a view which supports the first defendant's case. It does not show there is no reasonable prospect of the claimants succeeding in proving the law is as pleaded.
25. In addition as Ms Crowther QC points out, in fact the conclusions drawn by the witness are based on his application of the law to the facts of this case. In doing so, he makes assumptions as to the facts that will be found.
26. I am therefore not helped by the Portuguese law evidence. No proper expert evidence has been served on which I can make any determination. What I am left with is a pleading asserting a foreign law duty of care and a factual witness stating it would not succeed. That is a factual dispute which has to be resolved by expert evidence at trial.

Factual evidence

27. The factual evidence is relevant to the proposition that the first defendant had control and supervision sufficient to found liability. That must be in Portuguese law but it seems to be common ground that control and supervision are relevant to liability in Portuguese law.
28. The first defendant says that, unusually in this case, their factual evidence is such that I can find that there is no real prospect of success. The first defendant submits that what

the evidence demonstrates is that there was no form of control and supervision which could give rise to a claim. The authorities I have been taken to in relation to parent/subsidiary cases are from this jurisdiction, which the first defendant says has a wider test for control and supervision than in Portugal. Assuming for current purposes that is correct, if there would be no real prospect of success here, there cannot be in Portugal.

29. It is said the first defendant's evidence shows there is no element of control between the first defendant and EAA and that now it is clear it is not a parent company, it cannot be in a position to exercise control over EAA. It is said the Claimants' evidence is insufficient to support a claim.
30. I have been referred to the case of *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3. There is a difference between the parties on what that decision held in respect of the evidence expected in this sort of application and whether it is authority that there needs to be a parent/subsidiary relationship in order for there to be liability. It is the first defendant's submission that unless it is a parent, the first defendant would not be in a position to exercise any control, irrespective of the level of control required under English or Portuguese law. It relies on paragraph 146/147 of the judgment for that proposition:

"146 Secondly, the majority of the Court of Appeal may be said to have focused inappropriately on the issue of control. Simon LJ appears to have regarded proof of the exercise of control by the parent company as being critical: see, for example, paras 124, 125, and 127. The Chancellor's judgment at para 205 is to similar effect. As Lord Briggs JSC pointed out at para 49 in *Vedanta*, it all depends on: the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations . . . of the subsidiary. "

"147 In considering that question, control is just a starting point. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent."

31. I am not persuaded that *Okpabi* is authority for the proposition submitted. *Okpabi* was considering the issue in the context of the parent/subsidiary relationship rather than any other situation. As cited with approval in paragraph 151 of *Okpabi*, Briggs JSC in *Vedanta* states there is no limit to the models of management and control that may be put into place in a group of companies. The determination of whether there is control and whether it was in fact used will be fact specific.

32. In respect of the argument that in order to have control the company must have ownership, in my judgment it is not appropriate to give summary judgment where the evidence about corporate structure has changed over time and where the issue of control within groups of companies may be complex and not linear without any express precedent that only a parent can be liable for the actions of another group company member.
33. In respect of the dispute between the parties as to what level of evidence is required in order for the claimants to demonstrate a sustainable claim, it seems to me that is falling into the trap which *Okpabi* says I should not do. I should be looking at the pleadings and, unless there is very clear evidence to say that the facts alleged are wrong, or they are plainly unsustainable, assessing whether that claim has no real prospect of success.
34. In respect of the argument that there is no real substance to the claimants' case as the assertions are evidentially unsupportable, I do not accept that submission. There is some evidence from which the claimants' case has support. I accept, looking at the claimants' evidence as a whole, that there is evidence suggesting that the first defendant did take over control in a centralised manner of the pilot training at EAA. The claimants' pleading is not a clearly unsuitable factual scenario.
35. I cannot accept at this stage that the evidence from the first defendant's witnesses is obviously correct. Even if it would otherwise be appropriate to accept their evidence at face value, the witnesses have given what they say is now incorrect evidence about the company structure. In my judgment such a significant error made without explanation means, in the context of a summary judgment application, I cannot rely on their evidence in regards to the level of involvement of any of the L3 group of companies in EAA. In that context the first defendant's evidence that it was just branding merely raises a dispute of fact.
36. If the claim continues, I can reasonably anticipate that there will be more evidence in terms of manuals, group documents, board minutes etc which will be relevant to the dispute of the level of control and supervision (if any) of the EAA by the first defendant
37. The first defendant also argues that it cannot have the relevant control as it is not a registered training organisation. It seems to me that the fact that there is a regulatory framework within which EAA and not the first defendant is the registered training organisation is a factor which is likely to be taken into account in determining the issue of control and supervision, but is not determinative of it.

Conclusion

38. I am not able to say that there is no claim in Portuguese law as there is no proper evidence before me to do so.
39. I am not satisfied this is a clear and obvious case that the claim has, on the facts, no real prospect of success and I therefore dismiss the application.